No. 76-542

In the Supreme Court of the United States

OCTOBER TERM, 1976

JIMMIE DALE THOMASON, PETITIONER

v.

JOHN H. SANCHEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner asks the Court to reexamine its long-standing decision in *Feres* v. *United States*, 340 U.S. 135, precluding suits against the United States under the Federal Tort Claims Act by servicemen injured in activity incident to military service.

On November 30, 1972, petitioner was serving in the Army at Fort Dix, New Jersey. While riding his motorcycle on the post during his off-duty hours, petitioner was struck by a car driven by an "on duty" soldier; petitioner sustained severe injuries (Pet. App. 5a-6a, 19a).

Petitioner's actions against the driver, the driver's insurance company, and the United States were consolidated (see Pet. App. 4a-5a). On August 27, 1975, the district court held that recovery against the driver or his insurance company was precluded by the Federal Drivers Act, 28 U.S.C. 2679(b) to (e), which makes recovery against the

government the exclusive remedy for individuals injured by the negligence of a federal employee acting within the scope of his employment (Pet. App. 10a-11a). The court further determined (Pet. App. 14a) that recovery against the United States was precluded by *Feres* v. *United States, supra,* which held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service" 340 U.S. at 146. The court of appeals affirmed, holding that petitioner was limited to the benefits accruing to him as a member of the United States Army (Pet. App. 17a-27a).

Under the Federal Tort Claims Act, the United States is liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. But no private "circumstances" are "like" those in which a serviceman is injured in activity incident to military service. The relationship between the United States and the members of its armed forces is unique and distinctly federal in character, "fundamentally derived from federal sources and governed by federal authority." *United States* v. *Feres, supra,* 340 U.S. at 143-144. Tort liability not only would involve the military in litigation disruptive of military discipline, it would frustrate the scheme of limited liability embodied in the federally funded care and compensation scheme for military personnel. See *United States* v. *Brown,* 348 U.S. 110, 112; *United States* v. *Muniz,* 374 U.S. 150, 159; 38 U.S.C. 301 *et seq.*[1] For these reasons, this Court in

[1]As the Court explained in *United States* v. *Brown, supra,* 348 U.S. at 112:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the [*Feres*] Court to read that Act as excluding claims of that character.

Feres correctly concluded that Congress had not intended to permit tort claims in a military context: "We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence." 340 U.S. at 146.

Petitioner offers no sufficient reason why this Court should reconsider its determination of the congressional intent underlying the Federal Tort Claims Act. While petitioner cites cases applying the *Feres* doctrine or elaborating its proper limits (Pet. 5-8), there appears to be no conflict with regard to the application of that doctrine in the circumstances here. Indeed, the facts of this case are quite similar to those in *Feres.* In both cases the serviceman was injured during off-duty hours. But like Feres himself, who was asleep in his barracks when the fatal fire broke out, petitioner here sustained his injuries on a military base and "while on active duty and not on furlough." 340 U.S. at 138. In each case, therefore, the injury was sustained "incident to [military] service." 340 U.S. at 146. Accordingly, petitioner errs in suggesting (Pet. 9-10) that the decision below "enlarge[s]" the *Feres* doctrine.[2]

[2]Petitioner contends (Pet. 10-17) that *Feres* has been undercut by decisions recognizing that tort claims may be brought by prisoners and civilians (*United States* v. *Muniz, supra; United States* v. *Brown, supra*) or upholding governmental liability for negligent operation of a lighthouse or negligent firefighting (*Indian Towing Co.* v. *United States,* 350 U.S. 61; *Rayonier, Inc.* v. *United States,* 352 U.S. 315). But these decisions are not inconsistent with the reasoning in *Feres,* which was always limited to the context of the peculiar military relationship and its accompanying compensation scheme.

Petitioner relies upon *United States* v. *Brown, supra,* for the proposition that a serviceman's capacity to sue is solely dependent on whether the cause of action is cognizable under state law (Pet. 14). But the Court in *Brown* reached the question whether Brown's claim was cognizable under state law only after it had first concluded that the injury occurred while Brown was in a civilian status and that the *Feres* doctrine therefore did not apply. 348 U.S. at 112.

Fundamentally, petitioner claims hardship in being deprived of the type of tort recovery that might have been available to him had he not been engaged in military service, *i.e.*, that that alleged hardship warrants overruling *Feres*. But, recognizing the possibility of hardship, this Court said in *Feres* that "if we misinterpret the Act, at least Congress possesses a ready remedy." 340 U.S. at 138. *Feres* was decided in 1950. In the ensuing 26 years Congress has not seen fit to avail itself of that remedy. Congress' silence must be taken as approval of this Court's reading of its intent.[3]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1977.

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[3]We rely upon the discussion of the court of appeals (Pet. App. 25a-27a) to demonstrate that there is no merit to petitioner's due process contentions (Pet. 17-18).